

pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the case.⁴

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On June 28, 2016 appellant, then a 59-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on June 27, 2016 she injured her right knee when she stepped off a stoop while in the performance of duty. She indicated that after her injury her right knee began to swell. Appellant stopped work that day.

In a June 27, 2016 attending physician's report,⁵ Dr. Iquinder Singh, a Board-certified family physician, noted a history that appellant felt a crack in her right knee. She diagnosed right knee pain and checked a box marked "Yes," indicating that the condition was employment related. Dr. Singh advised that appellant should return in two days for work clearance. She also provided a work excuse of even date. Dr. Singh asked that appellant be excused from work on June 28 and 29, 2016, noting that appellant was seen on June 27, 2016 for a "medical concern."

In a duty status report (Form CA-17) dated June 30, 2016, Dr. Zoila Flores, an osteopath who practices family medicine, indicated that appellant could not work and that she was unable to determine when appellant could return to work. In a second form report of even date, she reported a date of injury of June 27, 2016 and diagnosed right knee pain. Dr. Flores indicated that appellant could return to work on July 5, 2016.

The employing establishment controverted the claim. In a June 29, 2016 correspondence, an injury compensation specialist noted that, two months prior, appellant had been cleared for full duty, however, she had been unable to complete her full route without assistance. The specialist indicated that, on the date of the alleged injury, appellant was instructed to deliver a 2-hour 20-minute walking route, but only delivered the business portion and did not deliver her walking piece, returning to the employing establishment to report her injured knee. The specialist also indicated that the employing establishment believed that the claim was fraudulent. A job

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

⁵ This report, designated as Part B, was attached to an unsigned Authorization for Examination and/or Treatment (Form CA-16).

description for city carrier was attached. The record reflects that appellant has two separate accepted claims.

In a development letter dated July 1, 2016, OWCP informed appellant that the evidence submitted was insufficient to establish her claim. It advised her of the type of factual and medical evidence necessary to establish her claim and attached a questionnaire for her completion. OWCP afforded appellant 30 days to submit the necessary evidence.

Appellant returned to full-time regular duty on July 5, 2016.

In a treatment note dated July 25, 2016, Dr. Robert Garroway, a Board-certified orthopedic surgeon, noted a history that appellant felt a pop in her right knee when she twisted her knee descending stairs while at work on June 27, 2016. He indicated that she was currently not working and that she complained of intermittent right knee pain that caused aches and difficulty walking. Dr. Garroway described right knee examination findings and noted that a right knee x-ray taken that day showed degenerative change and lateral joint space narrowing. He diagnosed right knee acute pain, primary osteoarthritis, and sprain. Dr. Garroway advised that the incident described by appellant was the competent medical cause of the injury, based on her symptoms and his objective findings. He advised that she could return to work with physical restrictions and recommended a right knee magnetic resonance imaging (MRI) scan. In a Form CA-17 report of same date, Dr. Garroway advised that appellant could not use stairs.

By decision dated August 17, 2016, OWCP denied the claim. It found the evidence insufficient to establish that the incident occurred as alleged. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

In an August 15, 2016 report, received by OWCP on August 23, 2016 Dr. Garroway reported his physical examination findings, and repeated appellant's history of injury and his diagnoses.

On September 13, 2016 appellant requested a hearing before a representative of OWCP's Branch of Hearings and Review.

At the hearing, held telephonically on December 22, 2016 appellant testified that on June 27, 2016 she had delivered mail for one to two hours, working the residential walking part of her route, and had delivered five or six blocks prior to the injury. She stated that she ascended five steps to put mail in a box, and as she stepped off, she twisted her right knee, but not her leg, heard a pop, and felt sharp pain that escalated as she walked away. Appellant noticed that her knee was swelling and returned to the employing establishment. She stated that she had called a supervisor to report the injury, who told her to return to the employing establishment. Appellant indicated that all of the houses on her residential route had five to six steps, and that she still had a brace on her knee, which remained "a little sore." The hearing representative advised her that Dr. Garroway needed to explain how the twist caused the injury, and left the record open for 30 days.

A December 23, 2016 MRI scan of appellant's right knee demonstrated tearing of the mid zone of the lateral meniscus and a probable free edge tear at the junction of the posterior horn and mid zone of the medial meniscus with tricompartmental chondral loss, mild subchondral edema, and osteophytes in the patellofemoral compartment with mild effusion, a patellofemoral synovitis,

and small popliteal cyst; slight laxity of the medial collateral ligament without acute tear; and mild distal quadriceps tendinopathy without tear.

In January 16 and September 13, 2016 form reports, Dr. Garroway advised that appellant had not reached maximum medical improvement and that her prognosis was guarded. He indicated that she could work eight hours per day, but could not climb stairs.

By decision dated February 13, 2017, an OWCP hearing representative affirmed the August 17, 2016 decision, as modified. He found that the June 27, 2016 employment incident had been established, but denied the claim, finding that Dr. Garroway had not provided a rationalized medical explanation of how the incident caused appellant's medical condition.

On August 21, 2017 appellant, through her representative, requested reconsideration. He submitted a March 27, 2017 report in which Dr. Garroway diagnosed tear of lateral meniscus of right knee. The representative opined that appellant injured her knee by twisting it while descending stairs completing her job duties on June 27, 2015 sic, indicating that he felt strongly that the injury described caused the meniscus tear.

By decision dated November 16, 2017, OWCP denied modification of its prior decision. It found Dr. Garroway's March 27, 2017 report insufficient to establish appellant's claim because he failed to explain how the June 27, 2016 incident caused the diagnosed meniscus tear.

In an April 25, 2018 treatment note, Dr. Garroway described complaints of continued knee pain, worse with activity, and noted that appellant was working, but avoiding stairs. He reported: right knee examination findings and diagnosed primary osteoarthritis of right knee; peripheral tear of medial meniscus, current injury, of right knee, with other tear of lateral meniscus; and acute pain of right knee. Dr. Garroway advised that the meniscal tears were from the 2015 injury which he felt was work related and that the injury also made appellant's arthritis worse. He concluded that stepping down at work that could involve load and twisting of knee could cause meniscal tears, and that appellant described this as the mode of injury. Dr. Garroway also resubmitted a copy of the December 23, 2016 right knee MRI scan.

On November 20, 2018 OWCP received appellant's November 13, 2018 request for reconsideration. Appellant described the June 27, 2017 employing establishment incident, maintained that after she felt her right knee pop she tried to continue walking and deliver mail, but the pain was excruciating. She indicated that she then called the employing establishment, drove back, and immediately sought medical attention.

By decision dated December 17, 2018, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁶ This discretionary authority, however, is subject to certain restrictions. For

⁶ 5 U.S.C. § 8128(a); *see R.K.*, Docket No. 19-1474 (issued March 3, 2020).

instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁷ Timeliness is determined by the document receipt date, *i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS).⁸ The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁹

OWCP may not deny a request for reconsideration solely because it was untimely filed. When a request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether the request demonstrates clear evidence of error.¹⁰ OWCP's regulations and procedures provide that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's request for reconsideration shows clear evidence of error on the part of OWCP.¹¹

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP. The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error. It is not enough to merely show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP. To demonstrate clear evidence of error, the evidence submitted must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹²

OWCP's procedures note and the Board has held that the term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence that on its face shows that OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report that, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹³ The Board makes an independent determination of whether a claimant

⁷ 20 C.F.R. § 10.607(a); *see T.L.*, Docket No. 19-1110 (issued August 11, 2020).

⁸ *R.T.*, Docket No. 20-0298 (issued August 6, 2020); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁹ *G.L.*, Docket No. 18-0852 (issued January 14, 2020).

¹⁰ 20 C.F.R. § 10.607(b); *A.K.*, Docket No. 20-0003 (issued June 2, 2020); *R.S.*, Docket No. 19-0180 (issued December 5, 2019).

¹¹ *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 2.1602.5(a) (February 2016).

¹² *G.B.*, Docket No. 19-1762 (issued March 10, 2020); *M.P.*, Docket No. 19-0674 (issued December 16, 2019).

¹³ Federal (FECA) Procedure Manual, *supra* note 8; *supra* note 9.

has demonstrated clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.¹⁴

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

OWCP's regulations and procedures establish a one-year time limit for requesting reconsideration, which begins on the date of the last merit decision issued in the case.¹⁵ A right to reconsideration within one year also accompanies any subsequent merit decision on the issue(s).¹⁶ The most recent merit decision regarding appellant's claim was OWCP's November 16, 2017 decision. As her November 13, 2018 request for reconsideration was not received by OWCP until November 20, 2018, more than one year after the November 16, 2017 decision, the Board finds that it was untimely filed. Because appellant's request was untimely, she must demonstrate clear evidence of error on the part of OWCP in denying her claim that she sustained an employment injury caused by the accepted June 27, 2016 employment incident.

The Board further finds that appellant's reconsideration request failed to demonstrate clear evidence of error on the part of OWCP in its last merit decision.

In support of the untimely request for reconsideration, OWCP received an April 25, 2018 treatment note from Dr. Garroway and a duplicate report of a December 13, 2016 MRI scan of appellant's right knee. In his April 25, 2018 report, Dr. Garroway merely reiterated his belief that the June 27, 2016 incident caused her diagnosed right knee meniscal tear. The Board finds this evidence insufficient to demonstrate clear evidence of error in OWCP's November 16, 2017 decision.¹⁷

The arguments raised in support of appellant's untimely reconsideration request did not establish that OWCP erred in denying her claim. She merely again described the June 27, 2016 incident and maintained that this caused her right knee injury. However, these arguments do not demonstrate clear evidence of error, as they did not raise a substantial question as to the correctness of OWCP's November 16, 2017 decision.¹⁸

The Board finds that appellant has not raised an argument or submitted positive, precise, and explicit evidence that manifests on its face that OWCP committed an error in the denial of her claim.¹⁹ Appellant has therefore not provided evidence of sufficient probative value to raise a

¹⁴ *T.N.*, Docket No. 18-1613 (issued April 29, 2020).

¹⁵ *Supra* notes 7, 8, and 9.

¹⁶ *L.F.*, Docket No. 19-0324 (issued January 2, 2020).

¹⁷ *M.C.*, Docket No. 18-1659 (issued December 2, 2019).

¹⁸ *Supra* note 9.

¹⁹ *U.C.*, Docket No. 19-1753 (issued June 10, 2020).

substantial question as to the correctness of OWCP's November 16, 2017 decision. Thus, the Board finds that the request failed to demonstrate clear evidence of error.²⁰

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim as it was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the December 17, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 15, 2020
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Christopher J. Godfrey, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

²⁰ *Id.*